(17)

IN THE

Supreme Court of the United States

October Term, 1942.

No. 431.

H. T. POINDEXTER & SONS MERCHANDISE COMPANY,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

PETITIONER'S REPLY BRIEF.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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THE FACTS ARE NOT IN DISPUTE.

The Poindexter affidavit (R. 10) and McManus affidavit (R. 30) prove the allegations of the complaint (R. 1) that the selling price increase was caused by factors other than the floor stocks tax.

This evidence was submitted with petitioner's Motion for Summary Judgment (R. 7) and was adopted by the United States in its Motion for Summary Judgment (R. 46).

The Court of Appeals did not disagree with the findings of fact made by the Trial Court.

In its brief (pp. 6, 7) the United States urges that the controversy was decided by the Court of Appeals on a mere question of failure of proof under Section 902.

This is not the situation presented to this Court. The Eighth Circuit held that under Section 902 the single fact of a price increase was the

> "concrete definite controlling consideration" (R. 73).

The United States repeatedly has urged that a mere increase in selling price served to shift the burden of the tax to the taxpayer's vendees; and this was urged in its brief before the Eighth Circuit in the instant case, as follows:

Brief for the United States before the Eighth Circuit, page 4,

> "Points and Authorities
>
> "2—Since the evidence shows that the taxpayer increased the price of its articles to an amount more than sufficient to cover the former prices of the articles, plus the amount of the tax sought to be recovered, it thereby shifted the burden of the tax to its vendees and cannot recover."

The Eighth Circuit in the instant case in its Opinion holds (R. 72),

> " * * * It is not necessary to declare there were no instances in which processors and owners of floor stocks bore the whole burden themselves. But where they immediately increased their prices sufficiently to cover the former prices of the articles plus the amount of the tax, *they manifestly shifted the burden to the customers.* (Italics supplied)

This ruling is in *direct conflict* with decisions of other Federal Courts on identical questions under Section 902, namely,

1. District Court of Maryland,
   Hutzler Bros. v. *United States,* 33 F. Supp. 801;
2. District Court of California,
   La Yebona Co. v. *United States,* 1942 Prentice Hall, 62, 546 (D. C. Calif.), appeal by United States, dismissed 127 F. (2d) 864;
3. 6th Circuit Court of Appeals,
   Cheek v. *United States,* 126 F. (2d) 3;
4. 7th Circuit Court of Appeals,
   C. B. Cones & Sons Mfg. Co. v. *United States,* 123 F. (2d) 530;
5. 4th Circuit Court of Appeals,
   Arkwright Mills v. *Com.,* 127 F. (2d) 465, has quoted *C. B. Cones & Sons Mfg. Co.* (*supra*) with approval, which in turn quotes and follows the *Hutzler Bros. case* (*supra*).

These above cases hold no presumption exists from a mere price increase, and further that where the evidence shows the floor stocks tax was never a factor in determining the sales prices but that the increase was caused by other factors, the burden of Section 902 has been adequately met.

In the instant case, the Trial Court detailed the facts causing the price increase (R. 50, 51, 53 and 54) and they were repeated by the Circuit Court in its statement (R. 67, 68 and 69).

By its ruling in the instant case, the Eighth Circuit also denies to the petitioner the right to increase its prices to recover the market value of the cotton content merchandise on July 30, 1933, the day before the tax became effective. This ruling is in direct conflict with the ruling in Seventh Circuit in *C. B. Cones & Sons Mfg.* v. *United States* (*supra*).

In both the Cones case and the Poindexter case Section 902 and identical facts are involved. The legal conclusions and rulings are in direct conflict with each other.

For reasons unknown to your petitioner, the United States did not seek review of the *Cones case.*

Petitioner herein now presents a conflict.

IMPORTANT PUBLIC QUESTION.

In its main brief (p. 10) the petitioner urges

> "The Government itself should welcome a final and authoritative pronouncement by this Court on these questions.
>
> "The many taxpayers who have (1) claims pending with the Bureau of Internal Revenue; (2) cases before the Processing Tax Board of Review, and (3) cases pending and those to be filed in various District courts and the Court of Claims will know, if this Court will settle these questions, whether to proceed further or to abandon their claims for refund of taxes under Title VII of the Revenue Act of 1936.

When the Congress was considering the Revenue Act of 1936 and the new Title VII thereof (refund section on Agriculture Adjustment Act taxes), the Senate Finance Committee in its report, pages 33, 34. stated

> "Necessity for Title VII
>
> " • • • "
>
> "The invalidation of the Agricultural Adjustment Act by the decision in the *Butler case* has given rise to possible claims for approximately $960,000,000 which has been collected under that act. This amount consists of approximately $850,000,000 in processing taxes; $98,000,000 in floor-stocks taxes; and $12,000,000 in compensating taxes. Processing taxes were paid by approximately 73,000 taxpayers; compensating taxes, by 75,000 taxpayers; and approximately 1,000,000 taxpayers paid floor stocks taxes. The possible number of claims, therefore, exceeds 1,000,000 • • •."

At this time there are pending in Federal courts a great number of cases on denied claims for refund of floor stocks taxes. There are now pending with the United States Processing Tax Board of Review more than 60 cases on denied claims for processing tax refunds, and many claims are still pending before the Bureau of Internal Revenue.

Therefore, the extent of all taxpayer claimants' burden of proof under Section 902, and particularly whether a price increase creates a presumption that the tax burden was shifted, is of importance to all courts and litigants.

CONCLUSION.

Until these questions are finally settled by this Court, a lack of uniformity between the various District Courts and Circuit Courts of Appeal will continue to exist.

This case presents an interpretation of a statutory restriction on the refund of an illegal and unconstitutional tax collection.

That Congress has the right to set restrictions is admitted, but conflict now exists in the Federal courts on the character and extent of these statutory restrictions; and until this Court settles these questions presented herein, they will continue to be applied by the Federal courts as well as administratively by the Bureau of Internal Revenue in a manner utterly lacking uniformity.

The Petition for Ceritorari should be granted.

Respectfully submitted,

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PETITIONER'S MOTION FOR REHEARING.

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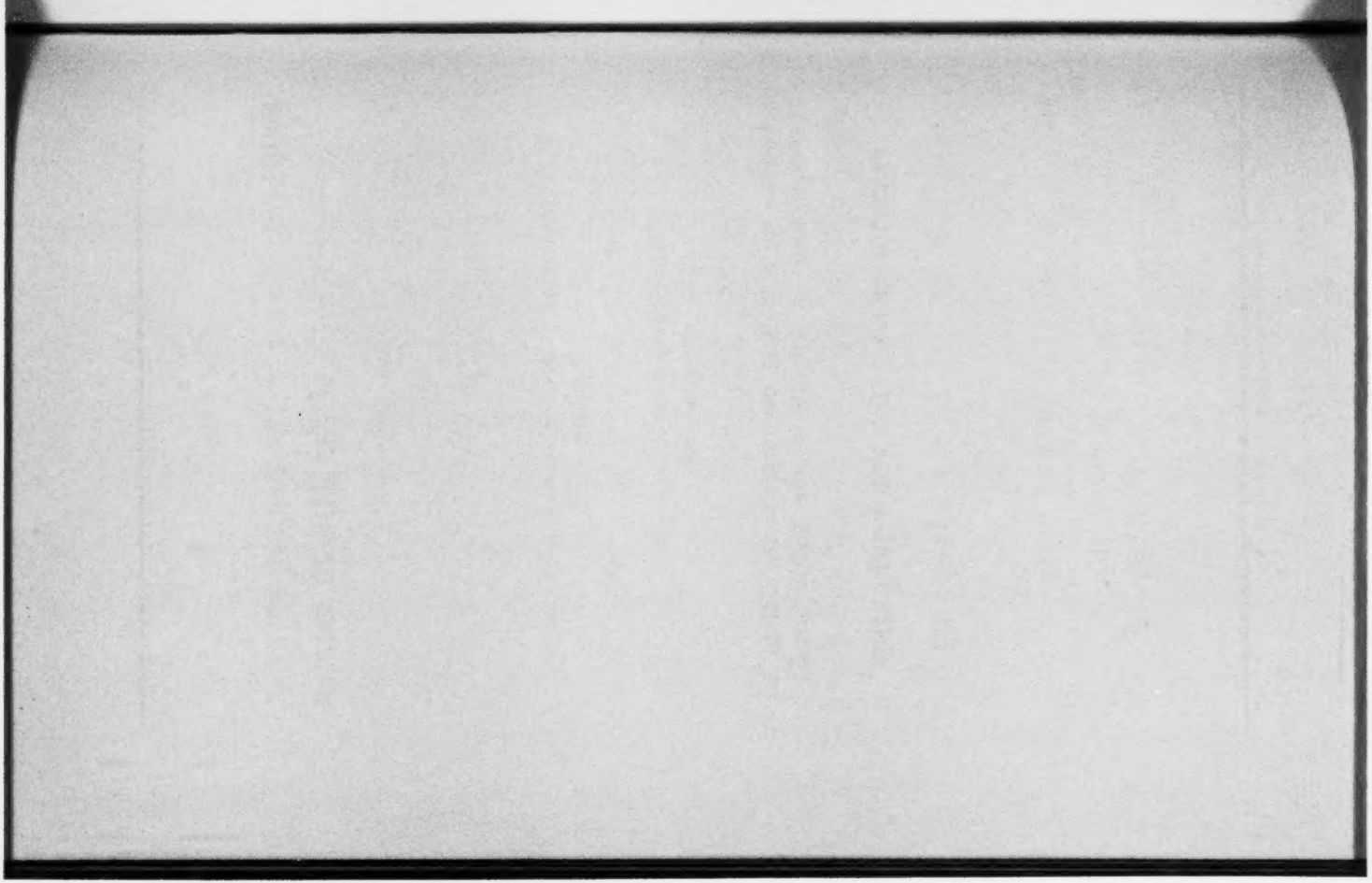

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PETITIONER'S MOTION FOR REHEARING.

The petition herein was denied by this Court on November 9, 1942.

It is respectfully requested that a rehearing be granted and that the petition be again considered and granted and for cause the petitioner shows:

1.

The question presented concerns solely the application of a statute of the United States:

Section 902 (page 18, appendix, main brief), Title VII, Revenue Act 1936.

The United States has collected as taxes under the Agriculture Adjustment Act over $960,000,000.00 (Senate Finance Report R. A. 1936—pages 33, 34). This Court held in *United States* v. *Butler*, 297 U. S. 1, that the Act was unconstitutional.

The amounts held by the United States became in effect *trust funds* which should have been returned immediately to the payor-taxpayers.

However, the Congress in the Revenue Act of 1936, Title VII (49 Stat. 1648) provided for certain factual conditions precedent before the monies would be returned to those who had paid the demanded tax.

2.

Decisions of the Federal Courts in the Fourth and Seventh Circuit Courts of Appeal (See cases—main brief, page 9) have construed Section 902 and the burden of proof required to be met by taxpayer claimant and these Courts have held that the *tax burden was not shifted* where:

(a) Selling price increase in August 1933 (date of tax) was caused by factors other than the tax.

(b) Selling price increase in August 1933 (date of tax) was to recover the wholesale market value of the goods as existing in July 1933; that is, the inventory profit before the tax date can be recovered by a price advance.

3.

The District Court (R. 51, 53, 54) in the instant case found as a fact, which was not disputed by the Circuit Court, that:

(a) Factors other than the tax caused the selling price advance.

(b) The tax was never a factor causing the selling price advance.

(c) The selling price advance was not sufficient to recover the wholesale market value of the goods as existing in July 1933.

4.

The decision of the Eighth Circuit in the instant case disregards the above decisions and facts and holds:

> "The increased prices manifestly shifted the burden of the tax and that the concrete definitely controlling consideration is the established fact that the selling prices were raised." (Court's Opinion R. 72 and 73)

5.

Therefore, the decision of the Eighth Circuit creates a *conclusive presumption* that under Section 902 an increase in selling price shifts the burden of the tax and conflicts with decisions in other circuits.

CONCLUSION.

It is, therefore, respectfully urged that equal protection under the laws and simple justice demands that a taxpayer claimant who in good faith paid without contest the demanded tax should not be penalized because he resides in the Eighth Circuit instead of the Seventh or Fourth Circuit boundaries of the Federal Courts.

Further, the remaining funds held by the United States are "trust funds" and the establishment and enforcement of a uniform application of the refund provisions of Title VII and Section 902 comes within this Court's definite jurisdiction.

WHEREFORE, that the rehearing be granted and Writ of Certiorari should be granted is respectfully submitted.

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